SUPREME COURT, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-434

LOUISIANA MATERIALS CO., INC.,
Petitioner

versus

ALWYNN J. CRONVICH, SHERIFF OF JEFFERSON PARISH, ET AL,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Louisiana Materials Co., Inc. prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Louisiana entered in the above entitled case on June 7, 1971.

CITATIONS TO OPINIONS BELOW

The opinion and judgment of the District Court is unreported and is printed in the appendix beginning at page A-31. The opinion of the Court of Appeals, Fourth Circuit, State of Louisiana, printed in the appendix at page A-14, is reported at 236 So.2d 510. The

writ of review issued by the Supreme Court of Louisiana is reported at 256 La. 849, and 239 So.2d 356, and is printed in the appendix at page A-8. The opinion of the Supreme Court of Louisiana is printed at page A-1 of the appendix and is reported at La. , and 249 So.2d 123.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered on June 7, 1971. A timely petition for rehearing was denied on June 28, 1971, and this petition for certiorari was filed within ninety days of that date. The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

Whether the Parish Council, Sheriff and other Officials of Jefferson Parish, Louisiana, could constitutionally determine that petitioner's shell and materials business was a nuisance or dangerous operation and forcibly shut down petitioner's business without notice, without opportunity to be heard and without any judicial or legislative process whatsoever and despite the absence of any general law pursuant to which the operations could be shown to be a nuisance or dangerous operation.

Whether the Parish officials may, without formal adoption, proclaim and enforce regulations directed solely toward shell trucks operating from petitioner's yard, and then shut down petitioner's yard because trucks proceeding to and from the yard allegedly violated such regulations.

Whether Parish authorities may, for any purpose, shut down a business without legal process but by force of arms.

CONSTITUTIONAL PROVISION INVOLVED

Petitioner invokes the protection of Section 1 of Amendment XIV of the Constitution of the United States:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case involves the right of certain elected and appointed officials of the Parish of Jefferson, Louisiana,[1] to shut down petitioner's shell and materials business which had been carried on at the same location in Jefferson Parish for approximately nine years, despite the absence of a general statute authorizing such closing, without either a legislative or judicial hearing, without notice, without an opportunity to defend and

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[1] Respondents are: Alwynn J. Cronvich, Sheriff, Ross Ketchum, Director of the Department of Roads and Bridges, Thomas F. Donelon, Parish President, Charles J. Eagan, Jr., Anton Pilney, Jacob H. Sciambra, Harold L. Molaison, George J. Ackel, Charles M. Miller and Beauregard H. Miller, Jr., all Parish Councilmen, and the Parish of Jefferson.

without right of appeal—in short, without any semblance of due process.

1. Statement of Facts

Since 1961, Louisiana Materials has operated a shell and materials yard on the banks of Lake Pontchartrain adjacent to the Suburban Canal in Jefferson Parish, an unincorporated area of the State of Louisiana. This yard is located between the levee which is maintained by the Board of Commissioners of the Pontchartrain Levee District (hereinafter called "Levee Board") and the water's edge. Similar operations had been carried on at these premises by others since 1958, and Louisiana Materials succeeded to the rights of the earlier operators.

Louisiana Materials occupied the premises continuously since 1961 pursuant to a grant of right of way, or servitude, from the Levee Board.[2] When Louisiana Materials began its operation at the Lakefront Yard, the area was undeveloped, vacant land. Subsequently, the nearby area on the protected side of the levee developed as a residential section.

Louisiana Materials' business is the dredging of shells from the bottom of Lake Pontchartain, the transporting of them by barge to its various yards, including the Lakefront Yard here in question, and the selling of them from the yards. At the yard the barges are unloaded, normally mooring on the banks of the Suburban Canal, a navigable waterway since time immemorial. These shells are then sold to various users, including the

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[2] Louisiana Material Exhibit No. 1, R. pp. 51-54.

Parish of Jefferson and the Department of Roads and Bridges, private contractors and others, and are loaded into trucks for delivery to the contract sites. In most cases, the purchaser of the shells provides the trucks to pick up the shells at the Louisiana Materials yard. In some cases, Louisiana Materials arranges for delivery by contracting with independent hired truckers who make the necessary delivers. Louisiana Materials neither owns nor operates any trucks which carry shells from the Lakefront yard.[3]

From time to time complaints have been made that shell trucks were causing inconvenience to local residents, and in 1965 certain routes were designated to be used by shell trucks.[4] No statute or Parish ordinance authorized this designation.

Louisiana Material's yard generally operates from 7:00 A.M. to 4:30 P.M. daily, after which no trucks enter or leave the yard. Occasionally, barges of shell are brought to the yard after 4:30 P.M. for the purpose of unloading; however, no unloading activities take place beyond 10:30 P.M., a time limit which was requested by officials of the Parish of Jefferson in 1965 and which has been complied with since that time. No ordinance of the Parish of Jefferson prohibits such activities nor has any judicial or other proceedings ever been brought to declare that such operations constitute either a nuisance or an illegal or dangerous activity.

For part of the period in question, Louisiana Materials

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[3] See generally the testimony of Gerald Vieages, Tr. pp. 1-9. (Tr. refers to the transcript of testimony numbered separately from the remainder of the record. R. will identify pages of the record.)

[4] Testimony of Olen Conaway, Tr. pp. 37-43.

had, in addition to its right of way agreement from the Levee Board, a lease from the Parish of Jefferson covering the same area recited in the servitude from the Levee Board. The last lease, however, expired on February 2, 1969, and was not renewed.[5] In February of 1969, Mr. James L. McConnell, Vice-President of Louisiana Materials Co., Inc., informed the Parish Council that Louisiana Materials considered that it was entitled to possession of the premises by virtue of its right of way or servitude from the Levee Board, and that it did not consider that it required any rights whatsoever from the Parish of Jefferson.[6] Subsequently, Louisiana Materials remained in undisturbed possession of the premises for a period of one year and twenty-six days until March 1, 1970, continuing its shell and materials business.

On Sunday morning, March 1, 1970, the Department of Roads and Bridges of the Parish of Jefferson, accompanied by deputies of the Sheriff of the Parish of Jefferson, constructed a concrete and steel barricade, installed a sign indicating that access to the ramp leading over the levee to the Louisiana Materials premises was closed by order of the Parish of Jefferson, and until the time of the hearing in the District Court maintained a Deputy Sheriff on duty prohibiting all ingress and egress to and from the premises.[7]

While Louisiana Materials was permitted to maintain

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[5] Respondents Exhibits D-1 and D-6, R.pp. 60-105; agreement of counsel, tr. p. 28.

[6] Testimony of James McConnell, tr.p. 51.

[7] See, generally, the testimony of Jerry Allen Drain, beginning at Tr. p. 16, and Louisiana Materials' Exhibits 2-7 and Defendants' Exhibits 16-20.

its stock of materials on the premises, no trucks or equipment could enter or leave the yard, and its business was effectively shut down.

No ordinance of the Parish of Jefferson authorized this illegal structure.

No eviction proceeding has been brought in any Court to obtain possession of the premises.

No hearing has been held before the Parish Council wherein Louisiana Materials would be given opportunity to present evidence, nor has any hearing been had before any court, with the view of declaring Louisiana Material's operations a nuisance. No ordinance or statute makes provisions for any such hearing or judicial proceeding.

There is no proof that any citations have ever been issued to any shell truck operators for violation of the designated route instructions, or that any convictions have been obtained for such violations, nor is there any proof that any citations have been issued or convictions ever obtained as the result of any alleged spillage of shell or sand eminating from Louisiana Material's yard on the Parish streets.

No proof has been submitted that any vehicle or agent of Louisiana Materials has ever violated any traffic regulations of the Parish of Jefferson.

No law or ordinance purports to permit the Parish to close down a business or to evict a property holder from his property because of alleged traffic violations.

2. Proceedings Below

On Monday, March 2, 1970, Louisiana Materials brought a petition for an injunction in the Twenty-Fourth Judicial District Court, Parish of Jefferson, against the defendants, coupled with a possessory action, a proceeding under Louisiana law. On March 2, 1970, a request for a temporary restraining order was denied by District Judge Gaudin, but the hearing on the preliminary injunction was fixed for March 5, 1970.[8]

Following the hearing on March 5, 1970, the court, on March 6, 1970, rendered judgment denying the preliminary injunction in this matter.[9] Louisiana Materials appealed to the Louisiana Court of Appeals, Fourth Circuit, from the denial of the preliminary injunction.

The three judge panel of the Court of Appeals reversed the District Court, unanimously holding that the actions of the Jefferson Parish Officials were in violation of the due process and equal protection clauses of both the United States and Louisiana Constitutions. The opinion of the Fourth Circuit Court of Appeals, State of Louisiana, is found in the appendix to this petition at page A-14.

Respondents sought writs to the Supreme Court of Louisiana. The writs were granted and on June 7, 1971, the Supreme Court of Louisiana, two justices dissenting, reversed the Court of Appeals. The opinion of the Supreme Court of Louisiana did not discuss the issues under the Constitutions of the United States or of

[8] The petition is at R. pp. 1; the amended petition is at R. pp. 27.

[9] The judgment and reasons are found in the appendix, at page A-31, A-33.

Louisiana, even though the Court of Appeal had held the actions of the Parish officials to be deprivations of due process, and even though this invalidity was urged in petitioner's brief to the court. Copy of the opinion of the Supreme Court is found in the appendix at page A-1.

Louisiana Materials timely petitioned for rehearing to the Supreme Court of Louisiana. Its petition was denied on June 28, 1971. Copy of the petition for rehearing is made a part of the appendix at page A-10, and the order of the Louisiana Supreme Court denying the petition for rehearing is found at page A-13.

3. Federal Questions Presented in District Court

The claim of deprivation of rights guaranteed by the Fourteenth Amendment of the Constitution of the United States, relating to due process and equal protection, were first raised in the initial petition which was filed by petitioner in the District Court. The original petition provided:

11.

> "Such unreasonable and arbitrary actions have been taken in total absence of both procedural and substantive due process, without valid act of any legislative or regulatory body and without recourse whatsoever to the courts of the State of Louisiana, which have been continuously in session and competent to adjudicate any grievances which the Parish of Jefferson may have against petitioner, and to enforce any judgment in connection therewith.

Copy of the entire original petition is included in the record beginning at page one.

The constitutional rights were further urged by petitioner in oral argument and briefs to the District Court which do not appear in the official record. In its reasons for judgment the District Court did not specifically discuss the constitutional claims but held "under the facts and circumstances of the instant matter, however, the disturbance—i.e., the erection of the barrier—was a reasonable exercise of the Parish's authority and/or power."

On appeal of this matter petitioner urged the constitutional issues in article six and seven of its brief to the Court of Appeals.[10] The three judge panel of the Court of Appeals, Fourth Circuit, State of Louisiana, reversed the District Court, stating:

> "When considered with the due process requirements of both the State and Federal Constitutions, which require notice and an opportunity to defend in an orderly and correct proceeding; with the settled Louisiana law that an eviction can only be effected through an eviction proceeding in the courts; and with the fact that the claimed lease expired almost thirteen months previously, defendants' contention that this forcible eviction was within the rights of the parish must be rejected."

and

> "The taking of Louisiana Material's property, without hearing, is likewise a deprivation of property without due process, if grounded in supposed traffic violations."

In the Supreme Court of Louisiana petitioner again

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[10] Petitioner's brief to the Court of Appeal is found in the record certified to this court.

urged in brief the protection of the due process and equal protection provisions of Amendment XIV to the Constitution of the United States.[11] Petitioner filed no pleadings at this stage of the proceedings in the Supreme Court of Louisiana. As respondent in writs, petitioner was not called on to file pleadings, and urged the Federal questions in the only way open to it.

The opinion of the Supreme Court of Louisiana did not discuss the specific constitutional questions nor the holding of the Court of Appeals that the actions of the parish officials were violations of the due process and equal protection clauses of the United States Constitution. The Supreme Court opinion merely stated:

> "The parish of Jefferson has full authority to regulate its public streets L.S.A.-R.S.48:471, 481. The Parish has limited the use of Lake Villa Drive to vehicles weighing no more than three tons.
>
> "As we have noted, the shell hauling trucks affected by the barricade exceed the weight limit, whether empty or loaded. The record discloses that the use of the streets by the heavy trucks causes damage to the street and a serious noise-dust problem to the adjacent residences. The expulsion of these overweight trucks from the street is well within the regulatory authority of the parish.
>
> "The circumstances that the parish has heretofore permitted violations of the weight limit is no bar to the present enforcement."

[11] Copy of the brief is included in the record which has been certified separately from the Supreme Court of Louisiana.

The complete Louisiana Supreme Court opinion is found at the appendix at page A-1.

REASONS FOR GRANTING THE WRIT

1. THE LOUISIANA SUPREME COURT DECIDED THIS MATTER IN A WAY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT

The Louisiana Fourth Circuit Court of Appeals in holding the action of the Jefferson Parish officials to be a deprivation of property without due process cited *Yates v. Milwaukee*, 10 Wall 497, and quoted the following language from that decision:

> "It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the state, within which a given structure can be shown to be a nuisance can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved or even by the city itself."

The holding of *Yates*, and the language quoted by the Court of Appeals was announced by this court almost exactly one hundred years ago. Its holding has been followed, and the above language repeated, in hundreds of cases from virtually every jurisdiction. Its rule has never been questioned, and *Yates* remains viable today.

But here the Supreme Court of Louisiana, contrary to the guideline of *Yates*, has held that the Parish officials may declare that petitioner's operation constitutes a nuisance, and summarily remove it.

The decision of the Supreme Court of Louisiana is not in accord with the decision of this court in *Yates*.

In this case no ordinance of the Parish of Jefferson or any applicable statute designates that operations such as those carried on by Louisiana Materials constitute a nuisance. No ordinance or statute prohibits operations such as these and, in fact, the Louisiana Civil Code, regulating the use of the shores of Lake Pontchartrain, specifically provides that vessels may be unloaded there. Louisiana Civil Code, Article 452 provides:

> "From the public use of the sea shores, it follows that every one has a right to build cabins thereon for shelter, and likewise to land there, either to fish or shelter himself from the storm, to moor ships, to dry nets, and the like, provided no damage arise from the same to the buildings and erections made by the owners of the adjoining property; provided however, that where a sea shore is within the limits of an incorporated city or town, such sea shore shall be subject to the police power of such city or town as set forth in its charter, and no cabins or other structures shall be built on such sea shore or in the waters adjacent thereto except upon such conditions as the city or town may prescribe."

Jefferson Parish is not an incorporated area.

The Supreme Court of Louisiana recently refused writs in a case which held that a similar operation could not be considered to be a nuisance. *Ritchey v. Lake Charles Dredging & Towing Co., Inc.*, 230 So.2d 346, writs refused, 255 La. 816. There has not been any citation to Louisiana Materials nor has there been any

hearing, either legislative or judicial, in which Louisiana Materials was notified that its business was considered to be a nuisance. There has been no judicial hearing and perforce, no appeal therefrom. The Parish officials, without the benefit of any general laws within which this operation can be shown to be a nuisance, have merely declared that it is one and have, by force of arms, shut down petitioner's business.

Louisiana Supreme Court in conjunction with its nuisance argument stated:

> "The record designates that the use of the street by the heavy trucks causes damage to the street and a serious noise-dust problem to the adjacent residences.
>
> "The expulsion of the overweight trucks from the street is well within the regulatory authority of the parish."

The opinion also states that the Parish of Jefferson has full authority to regulate its public streets and cites LSA:RS 48:471 and 481. These statutes provide:

> "§471. This Chapter does not apply in any manner to roads, streets, or alleys which are part of the state highway system.
>
> "§481. Parish governing authorities may pass all ordinances which they think necessary relative to roads, bridges, and ditches, and may impose such penalties to enforce them as they think proper."

Certainly nothing in these statutes permits the closing of petitioner's yard for supposed traffic violations.

The Parish has not cited to the court or included in the record any Parish ordinances which permit the drastic action taken by the Parish. In fact, the only Parish ordinances involved are traffic regulations which provide nominal penalties and even these penalties may be imposed only after citation, trial, and opportunity to defend before the traffic court and opportunity to appeal. The penalties are found in §7 of Jefferson Parish Ordinance 5165, the Code of Ordinances:

> "§7. It shall be unlawful for any person, firm or corporation, partnership, association, organization, to violate or fail to comply with any provision of the 'Code of Ordinances, Jefferson Parish, Louisiana,' hereby adopted, or any amendment thereto. Where no specific penalty is provided therein, the violation of any provision of said Code or amendment thereto shall be punished by a fine not exceeding one hundred dollars ($100.00) or imprisonment for a term not exceeding thirty days (30) or by both fine and imprisonment. Each day any violation of any provision shall continue shall constitute a separate offense and be punished as such."

Even if statutes or ordinances existed which prohibited operations such as these, the unequal enforcement and discriminatory application would be violations of the equal protection provisions of the Fourteenth Amendment.

The evidence was uncontradicted that the Parish sought to designate routes to be followed by shell trucks while permitting other materials trucks, cement trucks,

etc., unlimited and unqualified use of all of the streets.[12]

This Court and lower federal courts have held that regulations which are purely arbitrary and which effect only one particular user or type of user violate the equal protection provisions when used in attempted regulation of the streets and highways. *Smith v. Cahoon*, 283 U.S. 553, and *J. H. McLeaish & Co. v. Binford*, 52 F.2d 151.

Louisiana Materials Co., Inc., a corporation, is entitled to assert constitutionally protected rights under the 14th Amendment. *General Life Insurance Company vs. Johnson*, 303 U.S. 77. The right to engage in an ordinary calling such as the shell and materials business is a constitutionally protected right of both liberty and property fully protected against incursions by the states by the Fourteenth Amendment. *Allgeyer vs. State of Louisiana*, 165 U.S. 578, and *Butcher's Union S. H. & L. S. L. Co. v. Crescent City L. S. & S. H. Co.*, 111 U.S. 746.

The holding of the Louisiana Supreme Court in this case that Louisiana Materials' yard may be closed because trucks going to or from its yard did not follow designated routes, where such route designations are not grounded in ordinances or statutes and where such designations apply only to shell trucks proceeding to and from petitioner's yard, and not to other trucks, is not in accordance with the equal protection requirements of the Fourteenth Amendment.

The penalty, closing down petitioner's business, is not

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[12] Testimony of Olen Conaway, Tr. pp. 39-40; Victor Schilhesi, Jr., Tr. pp. 72; Stanley J. Fireck, Tr. pp. 75-77.

found in any statute, and deprives petitioner of liberty and property without due process of law.

2. THE DECISION OF THE LOUISIANA SUPREME COURT APPROVES PRECIPITATE ACTION WITHOUT LEGAL PROCESS AND CREATES PRECEDENT DANGEROUS TO DOMESTIC ORDER AND VIOLATIVE OF SOUND LEGAL TRADITIONS

The property and other rights of Louisiana Materials are valuable in and of themselves and their deprivation alone constitutes an important matter and constitutes a substantial Federal question which this court should consider.

The manner in which the Parish officials acted effected a grave injustice to petitioner, who has been, and is now, prevented from carrying on a legitimate business pursuit.

Of even more significance, however, is the approval which the Louisiana Supreme Court decision gives to a flaunting of the minimal requirements of due process by the officials of Jefferson Parish. If a business may be closed on the mere allegation that it is a nuisance, where there is neither notice, hearing, right to defend nor right of appeal, a dangerous precedent has been established.

3. THE DECISION OF THE SUPREME COURT OF LOUISIANA IS FINAL AS TO THE RIGHTS ADJUDICATED

The effect of the judgment of the Supreme Court of

Louisiana is to deny petitioner's request for a preliminary injunction. This denial, however, is a final adjudication of important rights of petitioner. The judgment approves the closing down of petitioner's business without statutory authority, without notice, without an opportunity to defend and without an opportunity for appellate review. Petitioner is then required to litigate at length in the hopes that it may one day reopen its business. The right of the Parish officials to perform these arbitrary acts have been finally adjudicated adversely to petitioner in the Supreme Court of Louisiana.

Petitioner will concede, for purposes of this argument only, that there may be sufficient cause for shutting down its business should the parish enact a properly drawn statute and bring proper judicial proceedings pursuant to that statute to have petitioner's operation declared to be a nuisance or dangerous condition. Of course, in such a situation petitioner would be permitted to appear and present evidence and, in the event of an adverse decision, would then be permitted appeal, presumably suspensively, provided proper security is posted.

Any claim by respondents that petitioner's business was so inherently dangerous or overwhelmingly obnoxious to the residents of the area is belied by the fact that petitioner's business has been carried on without interruption for nine years and by the fact that the Parish granted petitioner a lease to carry out this very operation in the area. The Parish itself has been one of petitioner's prime customers. The Louisiana Supreme Court has recently denied writs in a case which held a similar business not to be a nuisance and which, particularly, held that such a business could not be a nuisance *per se*

under Louisiana law. Only a nuisance *per se* may be summarily closed. *Ritchey vs. Lake Charles Dredging & Towing Co., Inc.*, 35 al, 230 So. 2d 346 (La. App., 1970) cert. den., 225 La 816, 233 So.2d 252.

Louisiana law permits appeals from judgments relating to a preliminary or final injunction. Article 3612 of the Louisiana Code of Civil Procedure provides:

> "An appeal may be taken as a matter of right from an order or judgment relating to a preliminary or final injunction, but such an order or judgment shall not be suspended during the pendency of an appeal unless the court in its discretion so orders."

Louisiana Materials has been finally denied its right to maintain its operations while the courts adjudicate its rights. Petitioner's business has been shut down forcibly and remains shut down to this date. Petitioner's federal rights have been finally adjudicated adversely and these writs should be granted to correct this manifest injustice.

CONCLUSION

The extraordinary actions of the Jefferson Parish officials have resulted in depriving petitioner of the use of its property and the right to carry on its business despite the total lack of legislative authority for such actions and despite the total lack of procedural due process. Writs should issue to correct this manifest injustice.

WHEREFORE, petitioner, Louisiana Material Co., Inc., prays that writ of certiorari issue directed to the

Supreme Court of Louisiana; that, after due proceedings, the judgment of the Louisiana Supreme Court be reversed and the judgment of the Court of Appeals, Fourth Circuit, State of Louisiana, be reinstated and this matter remanded to the District Court with directions ot issue an injunction, restraining respondents and their successors in office from interfering with petitioner's operations.

Respectfully submitted,

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NEAL D. HOBSON
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CERTIFICATE

The undersigned hereby certifies that copies of the foregoing Petition for Certiorari have been served on respondents by mailing copies thereof to Jomes O. Manning, Assistant Parish Attorney, attorney for respondents, postage prepaid, properly addressed to him at the New Parish Courthouse, Jefferson Parish, Gretna, Louisiana, this _____ day of September, 1971.

_____

APPENDIX

NO. 50,790

SUPREME COURT OF LOUISIANA

LOUISIANA MATERIALS CO., INC.

V.

ALWYN J. CRONVICH, SHERIFF OF THE PARISH OF JEFFERSON, ET AL.

ON WRIT OF CERTIORARI, OR REVIEW, TO THE COURT OF APPEAL, FOURTH CIRCUIT, PARISH OF JEFFERSON, LOUISIANA.

SANDERS, Justice.

In this possessory action, Louisiana Materials Co., Inc., sought an injunction requiring the officials of Jefferson Parish to remove a barricade from the end of Lake Villa Drive, barring the access of trucks to plaintiff's shell yard located between the levee and shore of Lake Pontchartrain. After a hearing, the district court denied a preliminary injunction. On appeal, the Court of Appeal reversed, ordered the issuance of the preliminary injunction, and remanded the case for further proceedings. 236 So.2d 510. We granted certiorari to review the judgment of the Court of Appeal. 256 La. 849, 239 So.2d 356.

Louisiana Materials is in the shell business. The company dredges shell from Lake Pontchartrain, places it on barges, and unloads it at various shell yards on the lake, including the shell yard located between the levee and

shore of Lake Pontchartrain at the end of Lake Villa Drive in Jefferson Parish. The shell at the Lake Villa shell yard is then sold to contractors and others who use it. Most of it is removed in the trucks of the purchasers. In some instances, however, Louisiana Materials retains independent truckers to deliver the shell to the purchaser.

The company has operated the shell yard in this manner since 1961. The levee is now bordered by a populated residential area known as Lake Villa Subdivision. The access street to plaintiff's shell yard is Lake Villa Drive, which has a load limit of three tons.

Louisiana Materials obtained a "right of way" agreement from the Pontchartrain Levee Board allowing it to handle and transport shells on the levee property. This right of way grant was subject to Louisiana Materials securing "whatever authority or permission is required from all Municipal, State or Federal agencies that may be affected." The company, accordingly, secured a lease on a year-to-year basis from the Parish of Jefferson covering the same premises described in the right of way agreement. The last lease with the Parish terminated on February 2, 1969. On March 6, 1969, however, the Parish Council adopted an ordinance consenting to the continued use of the right of way until February 28, 1970, after which it directed that the use cease. On December 19, 1969, the parish notified the plaintiff by certified mail that a barricade would be placed along the parish right of way line barring street access to the ramps leading to the shell yard after February 28, 1970. On March 1, 1970, a concrete and steel barricade was constructed on the parish right of way near the end of Lake Villa Drive. The following day, plaintiff filed this suit.

Louisiana Materials maintains it occupies the shell yard by virtue of a real right, the right of way agreement with the Levee Board, and that its possession of more than a year has been disturbed by the erection of the barricade, and that it is entitled to have its access to the public street protected by a mandatory injunction.

Jefferson Parish contends that the possessory action is unavailable because Louisiana Materials did not have the necessary possession for a period of one year before suit. Moreover, it contends the parish had the legal authority to erect the barricade under its broad powers of regulating and controlling the use of its public streets.

Plaintiff seeks a preliminary injunction as an ancillary remedy in this possessory action. See LSA-C.C.P.Art. 3663. The basic inquiry then is whether plaintiff has satisfied the requirements of a possessory action. We think not.

Article 3658 of the Louisiana Code of Civil Procedure provides:

> "To maintain the possessory action the possessor must allege and prove that:
>
> "(1) He had possession of the immovable property or real right at the time the disturbance occurred;
>
> "(2) He and his ancestors in title had such possession quietly and without interruption for more than a year immediately prior to the disturbance, unless evicted by force or fraud;
>
> "(3) The disturbance was one in fact or in law, as defined in Article 3659, and

"(4) The possessory action was instituted within a year of the disturbance."

Article 3656 of the Louisiana Code of Civil Procedure defines the possession required as follows:

> "A plaintiff in a possessory action shall be one who possesses for himself. A person entitled to the use or usufruct of immovable property, and one who owns a real right therein, possesses for himself. A predial lessee possesses for and in the name of his lessor, and not for himself."

See also Grant Timber & Mfg. Co. v. Gray, 131 La.865, 60 So.374; Anderson v. Smith, 4 La.Ann.525.

The burden of proof is upon the plaintiff to establish the essential possession. LSA-C.C.P.Art.3658; Ware v. Baucum, 221 La.259, 59 So.2d 182.

Admittedly, plaintiff did not possess the levee property as owner. We are likewise convinced that at the time of the erection of the barricade, it did not possess as the owner of a real right.

The Levee Board right of way agreement provides:

> "It is further agreed and understood by both parties hereto that the grant of this exclusive right of way is subject to the Grantee herein, securing whatever authority or permission is required from all Municipal State or Federal agencies that may be affected."

Although Jefferson Parish is not specifically named in this provision, it is quite clear that the parish is an affected municipal agency. In order for Louisiana Ma-

terials to move its shell from Lake Pontchartrain to the shell yard area, its barges must use The Suburban Canal, a parish drainage canal on which is located the pumping station serving a major portion of Jefferson Parish.[1] Moreover, the parish must make its streets available to the trucks of the customers and haulers who haul the shell from the levee. The record reflects that the shell-hauling trucks weigh about 18,000 pounds when empty and 30,000 pounds when loaded. Hence, whether empty or loaded, they exceed the 3-ton weight limit of Lake Villa Drive.

Plaintiff now contends, however, that Jefferson Parish has no interest or title in any of the property used in its operations. Hence, a lease from the parish has always been unnecessary.

Plaintiff's position is untenable. Under the Levee Board Agreement, the right of way grant is subject to the authority and permission of the parish. Plaintiff correctly recognized the parish's rights by securing leases from it as long as it was able to do so. As a lessee, it could not question the lessor's title. LSA-C.C.Art. 3441; Pino v. Dufour, 174 La.227, 140 So.31; Thomas v. Jackson, 158 La.1019, 105 So.49; Campbell v. Hart, 118 La. 871, 43 So.533.

Under the lease, plaintiff possessed not for itself, but for its lessor, Jefferson Parish. LSA-C.C.P.Art.3656. After the lease from the parish expired on February 2, 1969, occupancy continued under the special-permission ordinance. The vicarious nature of plaintiff's possession, however, did not change. It continued to possess for the

[1] The evidence reflects that shells falling into the canal from plaintiff's operations impaired the drainage.

parish. LSA-C.C.Arts.3441, 3446. See Campbell v. Hart, 118 La.871, 43 So.533; Williams v. Douglas & Rooks, 11 La.Ann.632; Grave v. Scott, La. App., 107 So.2d 808; Bank of New Orleans v. Spencer, La.App., 160 So.175.

When the ordinance authority ended on February 28, 1970, the Levee Board right of way also terminated, because it was expressly conditioned upon the parish authorization. Thereafter, plaintiff held no occupancy authority of any kind.

We conclude that at the time the barricade was erected, plaintiff had no possession for itself. Hence, it is not entitled to possessory relief.

Moreover, under the circumstances of this case, the street barricade is not a disturbance that warrants a possessory injunction.

The Parish of Jefferson has full authority to regulate its public streets. LSA-R.S.48:471,481. The parish has limited the use of Lake Villa Drive to vehicles weighing no more than three tons.

As we have noted, the shell-hauling trucks affected by the barricade exceed the weight limit, whether empty or loaded. The record discloses that the use of the street by the heavy trucks causes damage to the street, and a serious noise-dust problem to the adjacent residences. The expulsion of these overweight trucks from the street is well within the regulatory authority of the parish.

The circumstance that the parish has heretofore permitted violations of the weight limit is no bar to the present enforcement.

As the trial judge correctly observed, the granting of the preliminary injunction would mean that the judicial power would be allied with those who would violate the vehicle weight limit on the public streets. Such an alliance is impermissible.

We hold that the district court properly disallowed the preliminary injunction.

For the reasons assigned, the judgment of the Court of Appeal is reversed and the judgment of the district court denying a preliminary injunction is reinstated and made the judgment of this Court. All costs are taxed against the plaintiff.

BARHAM J. DISSENTS
DIXON J. DISSENTS

DOMENGEAUX J

COURT OF APPEAL,

FOURTH CIRCUIT

Filed Oct. 1, 1970

827001276

CERTIORARI, OR WRIT OF REVIEW

UNITED STATES OF AMERICA,

STATE OF LOUISIANA,

SUPREME COURT OF LOUISIANA

Whereas, The Parish of Jefferson did apply to this Court on the 4th day of August A. D., 1970, for its review of the cause entitled

NO. 50,790

LOUISIANA MATERIALS CO., INC.

VS.

ALWYN J. CRONVICH, SHERIFF OF THE PARISH OF JEFFERSON, ET AL

No. 125-270 on the docket of the Twenty-Fourth Judicial District Court for the Parish of Jefferson, and No. 4189 on the docket of the Court of Appeal, Fourth Circuit State of Louisiana.

And, whereas, the Court did on the 30th day of September A. D., 1970, pursuant, to Article VII, Section XI, of the Constitution of Louisiana, make and issue the following order, to-wit—"It is ordered that the writ of review issue; that the Court of Appeal send up the record in duplicate of the case; and that counsel for plaintiff and defendant be notified."

Now, therefore, the said Court of Appeal is hereby commanded, in the name of the State of Louisiana and of this Honorable Court, to send up forthwith to this Court, at the City of New Orleans, the record in duplicate of the case above entitled.

Witness the Honorable Joe B. Hamiter, Chief Justice, on this 30th day of September, in the year of our Lord, One Thousand, Nine Hundred and seventy.

S. WALLACE MILLER
Deputy Clerk.

827001277

No. 50,790

SUPREME COURT OF THE STATE OF LOUISIANA

In re

applying for Certiorari, or Writ of Review to the Court of Appeal Fourth Circuit State of Louisiana.

CERTIORARI, or WRIT OF REVIEW
to be served on.

(Signed) CLERK

A-10

SUPREME COURT

STATE OF LOUISIANA

NO. 50,790

LOUISIANA MATERIALS CO., INC.

VS.

ALWYN J. CRONVICH, SHERIFF OF THE PARISH OF JEFFERSON, ET AL ON WRIT OF CERTIORARI, OR REVIEW, TO THE COURT OF APPEAL, FOURTH CIRCUIT, PARISH OF JEFFERSON, LOUISIANA

PETITION FOR REHEARING ON BEHALF OF LOUISIANA MATERIALS CO., INC.

Louisiana Materials Co., Inc. brings this Petition for Rehearing of the judgment of this Court rendered Monday, June 7, 1971, reversing the judgment of the Court of Appeals and reinstating the judgment of the district court for the following reasons:

I.

This Court erred in holding that Louisiana Materials Co., Inc. did not possess the property in suit as the owner of a real right, and that it was not entitled to an injunction requiring the removal of the barricade blocking access to the Louisiana Materials' yard erected by the Parish of Jefferson.

II.

This Court erred in holding that the exercise of the right-of-way from the Board of Commissioners of the Pontchartrain Levee District was conditioned on obtaining the approval of the Parish of Jefferson.

III.

This Court erred in finding that the exercise of the right-of-way required the use of a parish drainage canal.

IV.

This Court erred in holding that Louisiana Materials Co., Inc. could not possess adversely to the Parish of Jefferson, where the last lease from the Parish of Jefferson expired one year and twenty-six days prior to the institution of the action, and Louisiana Materials Co., Inc. notified the Parish Council that it was remaining in possession adversely to the Parish, and did so remain in possession.

V.

This Court erred in holding that the street barricade blocking all vehicular access to the property is not a disturbance which warrants a possessory injunction.

VI.

This Court erred in holding that the Parish of Jefferson is entitled to regulate the streets by preventing access to the streets from the Louisiana Materials Co., Inc. shell yard and in failing to hold that the action of the Parish of Jefferson and its officials was in

violation of the equal protection and due process clause of the Louisiana and United States Constitutions.

VII.

Petitioner shows that it needs further time for filing a brief in support of its application for rehearing, and requests an additoinal fifteen days within which to prepare and file its brief in support of this application.

WHEREFORE, petitioner, Louisiana Materials Co., Inc. prays that a rehearing be granted; that the judgment and opinion of this Court rendered on June 7, 1971, be recalled; that this matter be fixed for re-argument and that thereafter there be judgment herein affirming the decision of the Fourth Circuit Court of Appeals.

Petitioner further prays that it be granted an additional fifteen days within which to prepare and file a brief in support of this petition for rehearing.

(Signed) G. HENRY PIERSON, JR.
G. Henry Pierson, Jr.

(Signed) NEAL D. HOBSON
Neal D. Hobson
Attorney for Petitioner,
Louisiana Materials Co., Inc.
1122 Whitney Building
New Orleans, Louisiana 70130
Telephone — 525-0641

OF COUNSEL
MILLING, SAAL, BENSON, WOODWARD
& HILLYER

CERTIFICATE

The undersigned attorney of record hereby certifies that copies of the foregoing Petition for Rehearing have been served on defendants herein by depositing a copy thereof in the United States mail, postage prepaid, properly addressed to defendants' attorneys of record this eighteenth (18th) day of June, 1971.

(Signed) NEAL D. HOBSON

UNITED STATES OF AMERICA

STATE OF LOUISIANA

SUPREME COURT OF THE STATE OF LOUISIANA

New Orleans, 70112

New Orleans, Monday, June 28, 1971

AT CHAMBERS

Rehearings were refused in the following cases:

* * * * * *

50,790 La. Materials Co. v. Cronvich, Sheriff, etc.
BARHAM and DIXON, JJ., are of the opinion that a rehearing should be granted.

* * * * * *

I, Andrew J. Falcon, Deputy Clerk, Supreme Court of Louisiana, do hereby certify the above to be a true and correct extract from the minutes of this Court.

IN WITNESS WHEREOF, I hereunto sign my name and affix the seal of the Court aforesaid, at the City of New Orleans, this the 20th day of September, A.D., 1971.

Deputy Clerk, Supreme Court of Louisiana

COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA

LOUISIANA MATERIALS CO., INC.

VS.

ALWYN J. CRONVICH, SHERIFF OF THE PARISH OF JEFFERSON; ROSS KETCHUM, DIRECTOR OF THE DEPT. OF ROADS AND BRIDGES OF THE PARISH OF JEFFERSON, THOMAS F. DONELON, PRESIDENT OF THE PARISH OF JEFFERSON, CHARLES J. EAGAN, JR., ANTON PILNEY, JACOB H. SCIAMBRA, HAROLD L. MOLAISON, GEORGE J. ACKEL, CHARLES M. MILLER AND BEAUREGARD H. MILLER, JR., COUNCILMEN OF THE PARISH OF JEFFERSON

APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON, LOUISIANA, NO. 125-270, DIVISION "G", HONORABLE H. CHARLES GAUDIN, JUDGE

JEROME E. DOMENGEAUX
JUDGE

JUNE 1, 1970

(Court composed of Judges William V. Redmann, Chris T. Barnette and Jerome E. Domengeaux)

G. HENRY PIERSON, JR.
and
NEAL D. HOBSON
MILLING, SAAL, SAUNDERS, BENSON & WOODWARD

OF COUNSEL FOR PLAINTIFF-APPELLANT
LOUIS DeSONIER, JR.,
BRUCE D. BURGLASS,
JAMES O. MANNING
FOR DEFENDANTS-APPELLEES

REVERSED AND REMANDED

Plaintiff-appellant Louisiana Materials Company, Inc., (hereinafter referred to as "Company") is in the shell business. They own and operate numerous shell yards including one on the banks of Lake Pontchartrain adjacent to the outfall or Suburban Canal in Jefferson

Parish. This particular shell yard is in an unincorporated area and is located between Lake Pontchartrain and a protection levee. The levee separates the shell yard area from the area which is now the Lake Villars Subdivision wherein numerous residences have been built. It is maintained by the Board of Commissioners of the Pontchartrain Levee District (hereinafter referred to as "Levee Board").

In order for vehicular traffic to come and go from the shell yard a ramp over the levee is utilized which exists on a shell road which leads to Richmond Avenue and Lake Villa Drive. The ramp has been in existence for many years (although the record is not clear on that point, it appears that it has been there since at least 1958); and until three or four years ago, was of ordinary shell construction at which time it was made into a hard-surface asphaltic thoroughfare by the Jefferson Parish Department of Roads and Bridges with the aid and cooperation of the Company. This was accomplished in order to improve the ramp roadway and eliminate dust. The Company's business includes dredging of shell from the bottom of Lake Pontchartrain from whence it is transported by barge to the Company's various shell yards including the Lakefront shell yard in question herein. At that point, the barges are unloaded and the shell is then sold to various users including the Parish of Jefferson and its Department of Roads and Bridges, to private contractors and others, and is loaded into trucks for delivery to sites designated by the purchasers. In most cases, the purchasers of the shell provide the trucks to pick up the shell at the Company yard. Usually the Company arranges for delivery by contract with individual hired truckers. The Company neither owns nor

operates any of the trucks which carry the shell away from the Lakefront yard.

The Company has operated at this site continuously since August of 1961 and has carried on the described operations since that time. Similar operations have been carried on from this location by other shell companies dating back to 1958. The Company has occupied the premises pursuant to an exclusive grant of right-of-way or servitude by the Levee Board which grant is effective until 1972. The right-of-way agreement grants to the Company the right of ingress and egress to the shell yard site and the levee referred to hereinabove is included within said right-of-way. It grants the Company the right to store its shell, sand, gravel, etc., within the designated area while said material is in transit between its unloading and its ultimate sale to various purchasers. Under the instrument the Company is authorized to do whatever is necessary to carry out its operations subject to, however, its securing whatever authority or permission may be required from any municipal, state or federal agency which may be affected. The grant prohibits the construction of any improvements on the shell yard site without prior written approval of the Levee Board and further provides that the exclusive right of way shall not interfere with any improvements to the levee which may be deemed necessary by the United States Engineers for the New Orleans District.

In addition to the right-of-way which the Company received from the Levee Board the record shows that the Parish of Jefferson has leased the same premises described in the right-of-way agreement to the Company on a year-to-year basis and for the same purposes as

are set out in the right-of-way agreement. The last yearly lease expired on February 2, 1969, but an ordinance of the Parish of Jefferson allowed the Company to carry on its operations until February 28, 1970. The Company was notified by the Parish of Jefferson that its lease would not be renewed.

At the time that the Company began its operations in 1961 the land area across the levee from its site was undeveloped but as said area became subdivided and residences built, complaints were made from time to time by the steadily growing number of local residents, to the effect that the shell trucks operating to and from the Company's yard were causing inconvenience generally and specifically making noises and causing an unusual amount of dust. In 1965 the parish authorities designated certain routes which were to be used for shell trucks only. It is apparent that these special routes were not followed as directed and that it has been difficult to enforce the using of said routes.

On March 1, 1970, employees of the Department of Roads and Bridges of Jefferson Parish accompanied by a deputy of the Sheriff's Office of said Parish constructed a concrete and steel barricade across the edge of the ramp described herein and installed a large sign reading "Ramp Closed by Parish of Jefferson." This barricade, in effect, prevented all ingress and egress to and being that the Company's business at that location has been completely shut down. Since that day a Deputy Sheriff of Jefferson Parish has been on duty prohibtiing all ingress and egress to and from the premises via the ramp. The barricade was constructed by directive of the Jefferson Parish President. There is no parish ordinance

authorizing the barricade nor has any eviction proceeding been brought in any court in connection with the Company's possession and/or operation. Neither has there been any hearing before the Jefferson Parish Council in connection therewith.

On March 2, 1970, the Company instituted suit in the District Court styling same a possessory action and petitioned for preliminary and permanent injunctions against defendants who were designated as the Jefferson Parish Sheriff, the Director of the Department of Roads and Bridges of said parish and the Parish President and Council. Subsequently as a result of exceptions of non joinder, the Parish of Jefferson and the Pontchartrain Levee District were brought in as defendants. The company sought injunctive relief preventing defendants from interfering with and obstructing its possession and use and rights of ingress and egress to their shell yard through and over the roads and streets in Jefferson Parish.

After hearing on a rule for preliminary injunction, the District Court ruled adversely to the Company and it has appealed devolutively to this court from the lower court judgment refusing their prayer.

In denying the injunction sought by the Company the trial judge concluded that the defendants disturbed in fact the possession of the Company, but under the facts and circumstances of this case, the erection of the barricade was a reasonable exercise of the authority and power of Jefferson Parish.

The appellant specifies error by the trial judge as follows:

1) In refusing to grant a preliminary injunction in its favor preventing defendants from interfering with its use and possession of its Lakefront Yard and requiring defendants to remove the barricade.

2) In holding that the Company occupied the premises pursuant to a lease from the defendant Parish of Jefferson until February 28, 1970, and that the Company could be forcibly evicted without judicial proceedings.

3) In holding that the defendant Parish may stop the Company's operations because of alleged traffic violations.

4) In holding that the defendant Parish could stop the Company's operation without prior Council hearings or judicial proceedings to determine whether or not a nuisance existed and in holding that forcible eviction is a remedy for nuisance.

Louisiana Materials was in undisputed possession of the Lakefront Yard from 1961 until March 1, 1970, and still retains possession thereof, although denied ingress and egress by the barricade and armed guard posted by defendants.

Having been in possession for over one year, Louisiana Materials is entitled to be maintained in possession against the world, and is entitled to an injunction to maintain this possession.

The possessory action is one brought by the possessor of immovable property or of a real right to be maintained in his possession of the property or enjoyment of the right when he has been disturbed, or to be restored to the

possession or enjoyment thereof when he has been evicted. LSA-C.C.P. art. 3655.

The requisites for a possessory action are found in LSA-C.C.P. art. 3658:

> "To maintain the possessory action the possessor must allege and prove that:
>
> "(1) He had possession of the immovable property or real right at the time the disturbance occurred;
>
> "(2) He and his ancestors in title had such possession quietly and without interruption for more than a year immediately prior to the disturbance, unless evicted by force or fraud;
>
> "(3) The disturbance was one in fact or in law, as defined in Article 3659; and
>
> "(4) The possessory action was instituted within a year of the disturbance."

The plaintiff in a possessory action is entitled to injunctive relief to maintain the status quo during the pendency thereof. LSA-C.C.P. art. 3663.

Although article 3661 of the Code of Civil Procedure does not normally allow evidence of title to be admitted in a possessory action, it does allow such evidence in certain limited cases one of which is for the purpose of proving possession by a party as owner. Pursuant to this provision Louisiana Materials placed into evidence its right of way agreement from the Levee Board for the purpose of showing that it possessed as owner of a real right—the right-of-way.

A right-of-way is a servitude, Mitchel v. Board of Commissioners, (La. 4th Cir.) 161 So.2d 384, and hence is an immovable or a real right, LSA-C.C. art. 470, 471; Arcadia Bond. Warehouse Co., v. National Un. Fire Ins. Co., 206 La. 681, 19 So.2d 514; St. Charles Land Trust, Achille Guibet v. St. Amant, 253 La. 243, 217 So.2d 385, and comes within LSA-C.C.P. art. 3658.

The lower court found that there was a disturbance, and this disturbance is clearly a disturbance in fact. LSA-C.C.P. art. 3659.

The denial of access to and from the public roads, of course, amounts to an eviction for which injunctive relief is proper. Mossler Motor Co. v. Jos. Schwartz Co., 159 La. 467, 105 So. 511.

Defendants contended below that Louisiana Materials was not entitled to maintain the possessory action for the reasons:

1. It was not a possessor pursuant to LSA-C.C.P. art. 3660.

2. The right of way agreement from the Levee Board was not valid.

3. Title to the land was in other parties.

The thrust of defendants' argument that Louisiana Materials was not a possessor was that a lease from the Parish to Louisiana Materials expired on February 28, 1970, and the required one year had not passed. The District Court so found. However, the last of the yearly leases from the Parish expired on February 2, 1969 over

one year earlier, as admitted by defendants' counsel. Louisiana Materials occupied the land adversely to the Parish for over a year thereafter. This defense therefore has no merit.

Defendants next claim, that the Levee Board had no authority to enter into the right-of-way agreement, was denied by the District Judge. Defendants offered no proof in connection with this claim.

Even if Louisiana Materials' grant from the Levee Board were wholly invalid, such would not be any defense to the possessory action. The Court of Appeal of Louisiana for the First Circuit in the case of Annison v. Womack, 200 So. 663, held that the validity of title is not an issue, stating:

> "Where the possession is under a claim of ownership, the only purpose in referring to the deed by which the property was acquired is to show the nature and extent of the possession. The question of the title is not an issue." 200 So. 663, at 665.

Here, as in that case, the defendants cannot take advantage of any defects in plaintiff's title to justify defendants' disturbance of the possession. Real and actual possession for more than one year is all that is required. Hill v. Richey, 221 La. 402, 59 So.2d 434 (1959).

Louisiana Materials has clearly demonstrated its right to a possessory action. It has possessed the property in question in excess of one year, and was in possession at the time of the disturbance complained of. The disturbance was one in fact, defendants having effectively barred

Louisiana Materials from any useful occupation of the property, and the action was instituted within one year of the disturbance. Louisiana Materials is entitled to a preliminary injunction to preserve its possession pending the outcome of this proceeding.

Defendants seek to justify their action in closing the yard by claiming:

1. Louisiana Materials was simply evicted at the expiration of its lease.

2. Louisiana Materials was not evicted; this barricade was merely the regulation of streets by the Parish.

3. Louisiana Materials' operations constitute a nuisance, and may be shut down.

These contentions must be considered against the background of the Constitutional requirements of due process and equal protection.

The Fourteenth Amendment of the United States Constitution provides:

> "No state shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, § 6 of the Louisiana Constitution provides for equal protection, although not using these words as such:

> "All courts shall be open, and every person for injury done him in his rights, lands, goods, per-

> son or reputation shall have adequate remedy by due process of law and justice administered without denial, partiality, or unreasonable delay."

Article 1, §.2 of the Louisiana Constitution provides:

> "No person shall be deprived of life, liberty or property, except by due process of law. Except as otherwise provided in this Constitution, private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid."

These provisions taken together form the basis of the due process and equal protection requirements of both federal and state law, which are similar.

The essential elements of due process of law are notice, and the opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case. Mongogna v. O'Dwyer, 204 La. 829, 16 So.2d 829.

Defendants seek to escape the thrust of plaintiff's action by taking the position that Louisiana Materials was a lessee, and has no right to bring a possessory action, contending that the lease expired on February 28, 1969, and that Louisiana Materials could properly be evicted. The lower court so held.

It is clear that this forcible closing of the only means of ingress and egress amounts to an eviction. The only other means of ingress and egress would be to cross some other part of the Lake Pontchartrain Levee District levee; however such crossing is illegal, and in any event the evidence shows that other streets leading to the levee have similarly been blocked off. There can be little doubt

that the parish would react by placing additional barricades if some other means of access to the property were to be found.

In fact, the last lease between the parties was executed on February 2, 1968 and expired on February 2, 1969. At that time the Parish refused to renew the lease, and the Vice-President of Louisiana Materials informed the Council Members that Louisiana Materials intended to maintain its possession in the premises pursuant to its rights from the Levee Board, and it did so maintain possession. It was one year and twenty-six days later that this action was taken by the defendants.

In any event it is clear that this forcible means of bringing about an eviction is procedurally incorrect even had there been a lease in effect. The courts of Louisiana have long held that to evict a tenant at the expiration of a lease, the owner or one entitled to possession must bring an eviction proceeding which must be prosecuted to a final judgment after appeal before the tenant or one wrongfully on the property can be evicted. Self help is not permitted even where the rights are clear.

The jurisprudence in this state leaves little doubt but that the only procedural method by which a tenant may be deprived of possession is by eviction proceedings.

> "* * * For more than a century the jurisprudence of this state has uniformly held that a lessor is without any right to remove the property of a tenant and take possession of leased premises without resort to legal action." (citing cases), Mena v. Barnard, 113 So.2d 332, 333 (2d Cir., 1959).

A tenant is entitled to hold possession until deprived thereof by *judgment*. Liuzza v. Simms, 154 La. 339, 97 So. 470 (1923). In Mossler Motor Co. v. Jos. Schwartz Co., supra, the court held that the tenant was entitled to an injunction against the closing of an alleyway which constituted the only entrance and exit.

When considered with the due process requirements of both the State and Federal Constitutions, which require notice and an opportunity to defend in an orderly and correct proceeding; with the settled Louisiana law that an eviction can only be effected through an eviction proceeding in the courts; and with the fact that the claimed lease expired almost thirteen months previously, defendants' contention that this forcible eviction was within the rights of the Parish must be rejected.

Defendants next contend that this barricade, and the armed guard, were merely attempts to regulate the streets in the parish. They cite vague reports of trucks deviating from truck routes, speeding or otherwise violating traffic regulations.

Defendants have not presented any evidence to show that Louisiana Materials or any of its agents or employees have ever been arrested, convicted or even charged under any state or parish statute with any improper use of the roads and streets of Jefferson Parish either in connection with the operations from the Company's shell yard or from any other location. The statutes of Louisiana provide the penalties for improper use of the roads and streets, and these penalties may include, after a trial and conviction, the suspensions of drivers' licenses as well as jail terms and fines. No statute of the state

or of the parish even purports to give to any public official or private citizen the right to barricade an individual's or company's property so as to prevent that individual or company from having access to the public roads and streets.

The taking of Louisiana Materials' property, without hearing, is likewise a deprivation of property without due process, if grounded in supposed traffic violations.

Under the Louisiana statutes and cases, the defendants have no right to deny to Louisiana Materials the right of ingress and egress to and from its property to the public roads and streets of the Parish of Jefferson.

The basic rights to use public roads are found in articles 453 and 454 of the Louisiana Civil Code. Article 453 provides:

> "Public things are those, the property of which is vested in a whole nation, and the use of which is allowed to all the members of the nation: of this kind are * * * highways * * *."

Article 454 provides:

> "Things which are for the common use of a city or other place, as streets and public squares, are likewise public things."

While the Louisiana courts have seldom been required to consider such elemental rights, the Louisiana Supreme Court affirmed many years ago that a public road or street may be used by everyone whether residents of the locale, citizens or foreigners. Barbin v. Police Jury, 15 La. Ann. 544. The court later pointed out that muni-

cipalities have only the administration of public things, such as parks and streets, and that every person has the right to maintain an action to keep it open. Anderson v. Thomas, 166 La. 512, 117 So. 573.

While the parish is entitled to regulate the highways, such regulations "* * * must be reasonable, not arbitrary or capricious, must operate with equality, and must have some tendency to accomplish the proper end in view. An arbitrary interference with, or unreasonable restriction on, the fundamental rights with respect to the use of the highways is unjustified * * *" 40 CJS 248.

The Louisiana Supreme Court has recognized that the regulation of streets by the municipal authority must apply uniformly to all persons. City of New Orleans v. Badie, 146 La. 550, 83 So. 826.

Defendants lastly contend that the Lakefront Yard may be shut down because it is a nuisance.

Neither the defendants nor the parish legislative body may simply declare that operations are a nuisance and then proceed to suppress that operation. The operation must, in fact, be a nuisance and this can only be established after a full hearing before the Council and even then, the finding is subject to review by the courts. Ogelsby v. Town of Winfield, 27 So.2d 137 (2d Cir. 1946); City of Shreveport v. Leiderkrantz Society, 130 La. 802, 58 So. 578 (1912). The Parish Council has had no public hearing to determine whether the operations of a shellyard constitute a nuisance, nor has it adopted an ordinance declaring all shell operations to be nuisances. In Oglesby, supra, the court stated:

> "* * * *The safe rule is to have the alleged nuisance judicially declared to be a nuisance and its abatement procured through processes of government orderly exercised. It is only in cases of emergency that abatement of a nuisance may be accomplished without prior adjudication of a court authorizing such to be done,* and even in such cases, the abatement is done at the actor's risk and peril." 27 So.2d at p. 142 (Emphasis added).

The general rule is that a party should first be given the opportunity to show the legislative body and the court that its operations do not constitute a nuisance. The following has been quoted in many opinions:

> "It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the state, within which a given structure can be shown to be a nuisance can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved or even by the city itself." Yates v. Milwaukee, (1870, US) 10 Wall 497, 19 L.Ed 984. 14 ALR.2d 82.

The determination by the legislative body is subject to judicial review. City of Shreveport v. Leiderkrantz, supra.

If the Company's operations constitute a nuisance, it may be shut down only after due proceedings to have it declared as such.

Even if found to be a nuisance, no law purports to give the Parish the right to evict Louisiana Materials from its property. Should the shell operations be found to be a nuisance, some other non-offensive use may be found for the property. To deprive the Company of its property

in these circumstances is a deprivation of property without due process.

For the reasons assigned the judgment of the District Court in defining plaintiff's request for injunctive relief is reversed and set aside and this case is remanded to said court with instructions to issue a preliminary writ of injunction directing the defendants to remove the barricade which was constructed on March 1, 1970, described herein and to cease interfering with the possession and right of use by the Louisiana Materials Co., Inc., of its Lakefront premises pending the outcome of this litigation after further proceedings not inconsistent with our ruling herein. Costs of this appeal to be assessed against appellees-defendants and costs in the trial court to await final disposition of this case.

REVERSED AND REMANDED

TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

No. 125-270

DIVISION "G"

LOUISIANA MATERIALS COMPANY, INC.

vs.

ALWYNN J. CRONVICH, ET ALS

JUDGEMENT

Petitioner's request for a preliminary injunction was heard on March 5, 1970.

Present were: Neal D. Hobson and G. Henry Pierson, Jr. of Milling, Saal, Saunders, Benson and Woodward, for plaintiff; and

Louis DeSonier, Jr., Parish Attorney, and James O. Manning and Bruce D. Burglass, Assistant Parish Attorneys, for defendants.

For written reasons this day assigned.

IT IS ORDERED, ADJUDGED, and DECREED that there be judgment in favor of ALWYNN J. CRONVICH, ET ALS, defendants, and against petitioner, LOUISIANA MATERIALS COMPANY, INC., denying plaintiff's request for injunctive relief.

JUDGMENT READ, RENDERED, and SIGNED in Gretna, Louisiana, this 6th day of March, 1970.

/S/ CHARLES GAUDIN, Judge

JUDGE

TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

No. 125-270
DIVISION "G"

LOUISIANA MATERIALS COMPANY, INC.
vs.
ALWYNN J. CRONVICH, ET ALS

REASONS FOR JUDGMENT

The petitioner in this proceeding is Louisiana Materials Company, Inc., which asks the Court, generally, to enjoin various named defendants from interfering with plaintiff's business use of property situated on or adjacent to the levee near Lake Villa Drive in Metairie.

Louisiana Materials Company, Inc., hereinafter called Louisiana Materials, dredges shells from Lake Pontchartrain and loads them onto dump trucks, which in turn carry them across the levee and through Metairie to various construction or building sites.

There is a ramp across the levee, on which trucks must pass in order to reach (and depart from) the shell-loading area. Various sketches and photographs in evidence clearly portray this.

On Sunday, March 1, 1970, Jefferson Parish's Department of Roads and Bridges, acting on orders from the Parish President and Parish Council, constructed a barricade of concrete posts across the ramp, closing it, for all practical purposes, to vehicular traffic. Access to the Louisiana Materials shell pile was thus severed.

Petitioner contends, among other things, that its business operation was not a public nuisance, that it had a legal right to operate its business and that the named defendants cannot deprive Louisiana Materials from making reasonable use of the streets.

The defendants' actions, plaintiff argues, were arbitrary and capricious.

Louisiana Materials further asserts that it has a right of way agreement with the Board of Levee Commissioners of the Pontchartrain Levee District, a copy of which was submitted in evidence and marked "Louisiana Materials 1" for identification. Louisiana Materials is occupying the subject premises pursuant to this grant or servitude.

In addition to this right of way agreement, Louisiana Materials had had in effect a series of one-year lease contracts with the Parish of Jefferson.

The final lease expired on February 28, 1970. On December 19, 1969, the Parish Attorney, Louis G. DeSonier, Jr., wrote to Louisiana Materials and advised the company that the Parish would not enter into another lease. A copy of this letter is marked "Defendant 2" and is in evidence.

Apparently, Louisiana Materials, relying on its aforesaid right of way agreement with the Levee Board, ignored this communication and continued its shell-moving operations, which were, of course, terminated by the concrete post barrier.

Defendants feel that they were justified in erecting the posts. Initially, defendants contend that the Levee Board had no legal authority to enter into a right of way agreement with Louisiana Materials.

Further, defendants argue that the overall business operation of Louisiana Materials constitutes a public nuisance and hazard.

Ross Ketchum, the Parish's Director of the Department of Roads and Bridges, said that his office had received numerous complaints about the dump trucks riding over curbs, deviating from assigned truck routes, spilling shells and sand, endangering life and property by reckless operation, doing damage to streets, etc. Several Lake Villa Drive residents testified about the truck violations and also about the noise caused by shell-dredging barges in the Lake.

This noise, Mrs. Floyd Russo said, goes on until 11 p.m. every night.

Ray Condon, the Parish's Director of Sanitation, told about objections to Louisiana Materials use of the Suburban Canal, which runs parallel to Lake Villa Drive and enters the Lake near the company's shell pile.

An interoffice communication from P. J. Ferrera to

Mr. Condon, marked "Defendant 9" and put in evidence, describes a fairly serious problem caused by shells near the No. 2 Pumping Station. "The cause of this," Mr. Ferrera writes, "is Louisiana Materials while unloading shells from the barges, are spilling these shells in the canal."

Further:

"I don't see why this should be our responsibility to clean this canal. If Louisiana Materials won't get this done, we should consult the Parish Attorney's office to close the yard down."

Because of these and other objections, and because the Lake Villa Drive area was quickly developing residentialy, the Parish Council adopted Ordinance 9137, stating:

> "That the Louisiana Materials Company is herewith granted permission to operate their Shell Plant Installation on the Lakefront and Suburban Canal until the 28th day of February 1970, after which time the said Louisiana Materials Company shall cease its opeartions and said permission shall terminate."

This ordinance was adopted unanimously by the councilmen on March 6, 1969.

Unquestionably the Council was impressed by the fact that more and more residences were being built near the leased site. In 1961, when Louisiana Materials moved in, and before when another company was doing shell business at this location, the area around Lake Villa Drive was not developed.

On February 29, 1968, when Ordinance 8640 was adopted authorizing the Louisiana Materials lease for 1968-1969, councilman Anton Pilney voted against it. He represents the people of the Lake Villa Drive area.

And, as aforesaid, when the possibility of another one-year lease came up in March of 1969, all of the councilmen voted against it. Circumstances, apparently, had changed.

It should be noted that Louisiana Materials denies that it ever had a lease with Jefferson Parish. On page II of the original pretrial memorandum submitted to the Court, it is stated:

> "Counsel for the Parish administrative defendants has stated that Louisiana Materials Company, Inc., was in possession of the property on the south shore of Lake Pontchartrain by virtue of a lease with the Parish of Jefferson, and that the term of the lease expired on February 28, 1970. The purpose of defendants' actions is an obvious attempt to force Louisiana Materials Company, Inc., from the premises."

"There was no such lease."

Now, in the alternative, Louisiana Materials contends that "if such a lease existed, defendants' actions are nonetheless illegal."

First, let the Court say this. To deny that a lease existed is directly contrary to all of the evidence adduced. James McConnell, the company's vice president, identified his signature on the lease and acknowledged the lease's existence. An annual rental was paid to the

Parish. The lease was renewed each year until the last lease expired. Each year the Parish Council passed ordinances approving the leases. What else is required?

Obviously, there were leases; and the leases described the property that was the subject of the leases and also stipulated the consideration, the purposes, etc. The documents speak for themselves.

Were defendants' actions illegal?

The Court does not think so. After listening to and evaluating the various complaints over several years, the Council did what it felt was necessary to protect and safeguard the interests of the Lake Villa Drive area citizens. The Council refused to negotiate another lease, so advised Louisiana Materials, and then directed Mr. Ketchum to erect the barrier.

The Parish, through the Council, has the right to reasonably regulate and control its streets. Considering all of the evidence, nothing unreasonable was done in the instant case. The Council adjusted its thinking—and its rules and regulations—to conform to changing neighborhood conditions.

Petitioner feels that its right of way agreement with the Levee Board gives it an absolute right to continue in the shell business near Lake Villa Drive.

However, this very agreement has the following clause:

> "It is further agreed and understood by both parties here to that the grant of this exclusive right of way is subject to the grantee herein

securing whatever authority or permission is required from all municipal, state of Federal agencies that may be effected."

From 1961 to February 28, 1970, the grantee (Louisiana Materials) was successful in securing this authority or permission, but not thereafter.

The Court should add this. Lake Villa Drive is the major roadway leading to the shell pile and this street has a three-ton load limit, Mr. Ketchum said. From the testimony of an independent contractor in the trucking business, it appears that the shell-hauling trucks using Lake Villa Drive weigh 30,000 pounds when loaded, considerably over the street's load limit.

In the past, Parish Deputies likely didn't enforce the load limit ordinance as it certainly would be untenable for the Parish on one hand to grant a lease permitting the removal of shells by dump trucks and on the other hand issue traffic violations to truck drivers using Lake Villa Drive, the prime egress street.

The development of the area, in the Council's judgment, brought about a change.

For the Court to issue the requested preliminary injunction now, it would mean that judicial approval would be granted for the heavily-loaded trucks to violate Lake Villa Drive's load limit ordinance.

Along with the merits of the injunction request, various exceptions were argued on March 5, 1970. Rulings were made on all exceptions except defendants' no right or cause exceptions.

Defendants attack petitioner's standing in Court, contending, among other things, that:

> ". . . if in fact there is an agreement between the Board . . . and the petitioner . . . the Pontchartrain Levee District has no authority to enter into such an agreement because the Board only acquired a right of servitude."

In support of this, defendants cite *Louisiana Power and Light Co. v. Dileo*, 72 So. 2d 150; and *Bond v. Texas and Pacific Railroad Co.*, 160 So. 406. In these cases, however, the Courts were fully cognizant of all terms of all pertinent documents. Thus, in the Bond case, the Court could state:

"The instrument in the instance case is silent as to the right of the railroad company to lease any portion of the right of way to private industry. . ."

The contract or agreement by and which the Levee Board acquired its rights was not introduced in evidence and the Court is therefore unaware of any terms or clauses, restrictive or otherwise. For this reason, the exceptions are now of no merit although similar exceptions may again be filed when and if defendants are able to produce more and substantial proof in support thereof.

Petitioner claims possession pursuant to its right of way agreement and that LSA-C.C.P. Article 3656, etc., authorizes a possessory action.

The disturbance claimed is one in fact, as described in Article 3659, as opposed to a disturbance in law.

The Court will concede, and defendants will admit,

that there has been a disturbance. Under the facts and circumstances of the instant matter, however, the disturbance — i.e., the erection of the barrier — was a reasonable exercise of the Parish's authority and/or power.

Concluding, the Court would like to point out that what was not a public nuisance in 1961 became just that by 1969 merely by the residential development of the Lake Villa Drive area.

Thus, the Parish could legally do what it did.

Gretna, Louisiana, this 6th day of March, 1970.

/S/ H. CHARLES GAUDIN, Judge

JUDGE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-434

LOUISIANA MATERIALS CO., INC.,
Petitioners,

versus

ALWYNN J. CRONVICH, SHERIFF OF THE PARISH OF JEFFERSON, ET AL,
Respondents.

RESPONSIVE BRIEF ON BEHALF OF DEFENDANTS-APPELLEES

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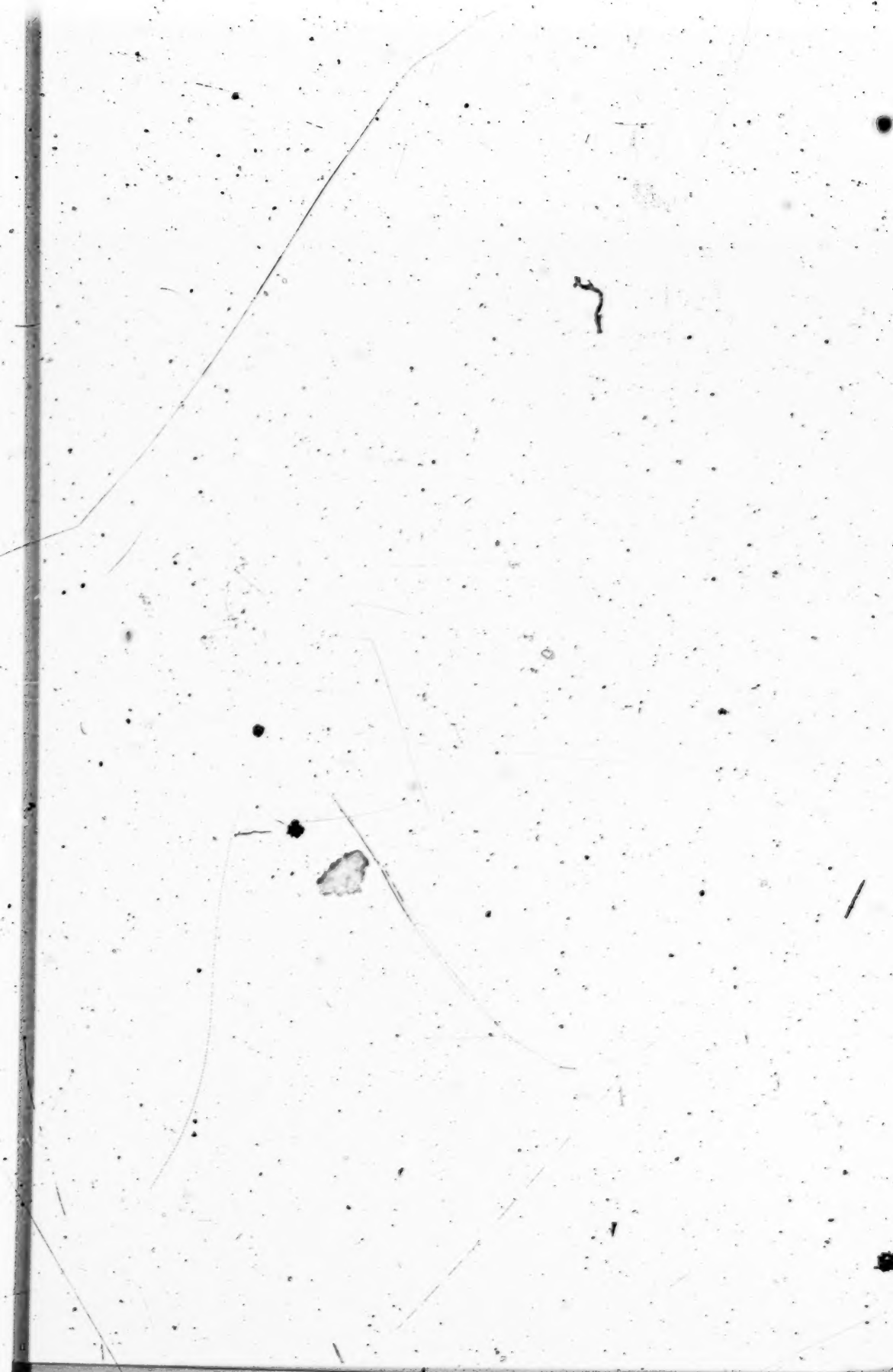

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SYLLABUS

Constitutional Law:

1. Due Process — Procedure.

Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. *Goldberg v. Kelly*, 397 US 254, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1970).

2. Due Process — Termination of Welfare Payments — Hearing.

The evidentiary hearing required by due process to be afforded a recipient of public assistance benefits before the termination of such benefits need not take the form of a judicial or quasi-judicial trial, and a complete record and a comprehensive opinion need not be provided at the pretermination stage; such hearing may be limited to minimum procedural safeguards adapted to the particular characteristics of welfare recipients and to the limited nature of the controversies to be resolved, and no procedural requirements beyond those demanded by rudimentary due process should be imposed upon the states or the Federal Government. *Goldberg v. Kelly*, 397 US 254, 25 L.Ed.2d 287, 90 S. Ct. 1011.

3. Due Process — Opportunity to be Heard.

Under due process principles, the opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. *Goldberg v. Kelly*, 397 US 254, 25 L.Ed.2d 287, 90 S.Ct. 1011.

4. Where landowners applying for permit to dredge and fill in navigable waters were given hearing before Corps of Engineers, the body empowered to grant or deny a permit, and were allowed to rebut findings and conclusions of Fish and Wildlife Service before the deciding body, denial of permit without hearing before Fish and Wildlife Service did not constitute deprivation of property without due process of law. Fish and Wildlife Coordination Act, Secs. 1, 2, 16 U.S.C.A. Secs. 661, 662; Rivers and Harbors Appropriation Act of 1899, Secs. 10, 33 U.S.C.A. Sec. 403. *Zabel v. Tabb*, 430 F.2d 199 (1970).

5. Minimum procedural safeguards required by due process in each situation depend on nature of governmental function involved and substance of private interest which is affected by the governmental action. *Escalera v. New York City Housing Authority*, 425 F.2d 853 (1970).

6. A suit for injunction to restrain interference with possession of realty was required to be dismissed for plaintiff's failure and apparent inability to prove possession of realty for a period of one year or more next preceding the institution of the suit. Code of Practice Article 298. *Bonnabel v. Police Jury for Parish of Jefferson*, 3 So.2d 183.

7. Article 3658 of the Louisiana Code of Civil Procedure provides:

> "To maintain the possessory action the possessor must allege and prove that:
>
> "(1) He had possession of the immovable property or real right at the time the disturbance occurred;
>
> "(2) He and his ancestors in title had such possession quietly and without interruption for more than a year immediately prior to the disturbance, unless evicted by force or fraud;
>
> "(3) The disturbance was one in fact or in law, as defined in Article 3659; and

"(4) The possessory action was instituted within a year of the disturbance."

MAY IT PLEASE THE COURT:

Lake Pontchartrain is an arm of the sea bordering on the boundaries of the City of New Orleans and Jefferson, St. Charles and St. Tammany Parishes. In the Parish of Jefferson, 215,000 residents are protected from inundation from the waters of Lake Pontchartrain by levees, a self-made mound of mud approximately 30 feet above water level.

The Parish of Jefferson is a suburb of the City of New Orleans and one of the fastest growing parishes in the United States, its population doubling every ten years. On the East Bank of Jefferson Parish, the parish being divided by the Mississippi River into the East Bank and West Bank, is the area in issue and includes a densely populated single-family residential district, known as Lake Villa Subdivision.

Some ten years ago, when the East Bank of Jefferson was sparsely populated, Louisiana Materials Company sought and obtained permission to operate a shell and gravel business over the levee in Lake Pontchartrain at the intersection of Lake Villa Drive and Suburban Outfall Canal.

The Company initially obtained a right of way agreement, a servitude in civil law, or an easement in common law, to allow representatives of Louisiana Materials and its customers to cross over the levee to

pick up sand and gravel which were deposited on an area between the shore of Lake Pontchartrain and the levee. Additionally, Louisiana Materials sought a lease from the Jefferson Parish Council, the governing authority of the Parish of Jefferson, for an initial period of five years, which was subsequently extended on a year to year basis.

From approximately 1966, Louisiana Materials was experiencing difficulty in obtaining extensions of its lease with the Parish of Jefferson for two-fold reason:

1. The Parish had numerous complaints from its Department Heads that the operation of Louisiana Materials at the Suburban Outfall Canal was particularly dangerous to the safety of the inhabitants of the East Bank during the hurricane season; also as shells from the barges would fall into the Canal and interfere with the drainage process of a large portion of the East Bank.

2. The area surrounding the plant had developed as a prime residential area and the noise, dust and unusually heavy trucks interfered with the peace and quiet of the residential area.

Finally in 1969, the Jefferson Parish Council refused to extend the lease for an additional period, however, it did grant Louisiana Materials an extension to operate from February 28, 1969 to February 28, 1970, without a lease, predicated upon Louisiana Materials Company's ceasing operation at the end of the extension, February 28, 1970. Additionally, in February 1969,

Resolution No. 14113 of the Jefferson Parish Council was adopted requesting the Administrative Agencies of the Parish of Jefferson to request Louisiana Materials to remove its yard and to assist the Company in obtaining another location.

The record will reflect a letter from the Parish Attorney for the Parish of Jefferson, dated some 60 days before the termination of the agreement advising Louisiana Materials that the time for the extension of the operation tendered by the Parish of Jefferson was about to terminate and requested that they remove all their equipment and cease their operation on or before February 28, 1970.

On March 1st, 1970, the Jefferson Parish Department of Roads & Bridges constructed a barricade of concrete posts at the end of Lake Villa Drive and the toe of the Lake Pontchartrain levee closing for all practical purposes vehicle traffic crossing the levee at Lake Villa Drive.

It is important to point out that on the East Bank of Jefferson Parish, *all streets are barricaded* at the end of the street and the toe of the levee of Lake Pontchartrain, the one exception being Williams Boulevard, where there is situated a boat launching site and vehicles cross the levee for the purpose of launching boats.

The levee is primarily built for flood protecting from the shallow waters of Lake Pontchartrain which are often whipped up by high winds particularly during

hurricane season. The levee is closed to all vehicular traffic and is patroled by Levee Board and Parish Police to prevent the use of the levee for other than lawful purposes. Although no formal hearing was held before the erection of the barricade, there were numerous private and public conferences held between the representatives of Louisiana Materials and the Parish of Jefferson, Pontchartrain Levee Board and various Civic Associations interested in the operation of Louisiana Materials. It must be remembered that although the original lease and renewals were in existence approximately nine years and the last extension without a lease was granted to Louisiana Materials from February 28, 1969 through February 28, 1970, it was only that at this time Louisiana Materials Company reversed its position and stated it no longer needed permission or a lease from the Parish of Jefferson to maintain its operation across the levee of Lake Pontchartrain and Lake Villa Drive.

In early March, Louisiana Materials instituted a Possessory Action requesting an injunction against the Parish of Jefferson from interfering with the shell operation of the Company at its Lake Villa site. A Possessory Action under Louisiana Civil law, C. Code 3658 is one instituted by the owner of the property or one having a "real right in the property alleging it has been the owner of this property for more than one year and is being disturbed in its possession. One of the requirements to successfully institute this suit is that you possess this property as its owner or of a real right as defined by Louisiana law.

Plaintiff had always claimed it had the use of said property by the grant of a right of way from the Pontchartrain Levee District dated April 9, 1965 and the lease and extension of lease granted by the Parish of Jefferson.

The ownership of levees as such has never been judicially determined under Louisiana law. The levees are built under the direction of the Corps of Engineers, maintained by Levee Districts, supported by Louisiana taxpayers and afforded police protection by special Levee Board and Parish Police personnel, even though land such as that adjoining Lake Pontchartrain may be appropriated for Levee purposes and a levee may be constructed on the land, the ownership of the land under the levee remains that of the individual owner who owned the land at the time of the appropriation. Even though Louisiana Materials claimed that they possessed the land as an owner, several days after the institution of this suit, they sought to purchase the ground underneath the levee from various individuals who owned the property at the time the levee was erected.

On the trial for preliminary injunction, the injunction was refused by the Trial Court and Louisiana Materials took an appeal to our intermediate Court of Appeal, designated as the Fourth Circuit, situated in New Orleans, Louisiana, and the case was reversed and an injunction was granted. The Parish of Jefferson sought a review of this decision by the Louisiana Supreme Court by writs of certiorari, which were granted and the judgment of the Fourth Circuit Court

of Appeals was reversed and that of the Trial Court reinstated. Copies of all rulings are attached to Relators application for a writ of certiorari to this Honorable Court.

The Constitutional questions presented are:

(1) Whether, on March 1, 1970, when the Parish of Jefferson erected the barricade on its street prohibiting vehicular traffic from crossing the levee at Lake Villa Drive, Louisiana Materials afforded procedural due process.

(2) Does Louisiana Materials meet the requirements of Article 3658 of the Louisiana Civil Code needed to bring a possessory action under Louisiana law?

The answer would appear to be that they were afforded procedural due process.

We may begin by asking ourselves the question of whether the Parish of Jefferson's governmental function involved out-weighs the private interest of Louisiana Materials Company in continuing to do business on the levee at Lake Villa Drive in Jefferson Parish. The record is replete with evidence that the Parish of Jefferson had many governmental concerns in the operation of Louisiana Materials Plant. Louisiana Materials was extended a privilege as early as 1961 to operate the only commercial or industrial business on the entire eighteen miles of levee bordering Lake Pontchartrain.

This privilege was granted when the surrounding area was sparsley populated. This privilege was granted despite the fact that the entire area adjacent to the Lake was zoned solely for residential development.

This privilege was extended from time to tme despite the fact that trucks hauling from the shell site when loaded, were breaking the load limit law and the streets.

This privilege was extended despite the fact that there were numerous complaints from Administrative Departments of the Parish of Jefferson about the operation of this plant, particularly the threat of a barge ramming the grille of the Pumping Station, thereby causing the entire East Bank of Jefferson to be inundated.

This privilege was extended despite the fact that the Administrative Department complained that in the unloading process, shells from the barges fell into the outfall of Suburban Canal and interfered with normal drainage operation.

This privilege was extended despite the numerous complaint of residents of the area of the noise, traffic and dust caused by this privileged operation.

It was in February of 1969 that the Jefferson Parish Council advised Louisiana Materials, at a hearing that it could no longer tolerate the operation of Louisiana Materials or extend the privilege to allow them to operate in this residential area.

Sixty days before the termination of the extension period by Louisiana Materials was allowed to operate, the Jefferson Parish Council caused notice to be sent by the Parish of Jefferson requesting and advising Louisiana Materials to cease its operation and outlining the consequences if it did not cease its operation. The Jefferson Parish Council, as governing authority of the Parish, holds public hearings weekly at which representatives from Louisiana Materials Company could always make an appearance. However, it chose not to do so and completely reversed its position and stated that it no longer needed a lease from the Parish of Jefferson to conduct its operation at this site.

This is an abuse of a privilege extended by the political process. For some ten years, the last five on an annual basis, representatives of Louisiana Materials sought and obtained a lease from the Parish of Jefferson to conduct this operation and it was only after the Parish had granted it an additional year without a lease in order to allow Louisiana Materials to seek another site or to combine its operations with its other yards, that Louisiana Materials completely changed its position and claimed it possessed the land for a period of more than one year prior to institution of this litigation, and was entitled to remain at the site without the permission of the Parish of Jefferson.

It is important to point out that the servitude or right of passage granted by the Pontchartrain Levee District is predicated upon the approval of federal, state and parish governments and is so stated in the right of way agreement. It bears repetition that every other roadway, street or boulevard on the East Bank of Jef-

ferson Parish at the toe of the levee of Lake Pontchartrain is barricaded to vehicular traffic and constantly patroled by the various police forces to prohibit any unlawful activity.

It is of interest that immediately after filing this possessory action, Louisiana Materials sought to acquire the land under the levee from prior owners by quitclaims and is an admission that it did not possess the land as owner for a period of more than a year as required by Article 3658 of the Louisiana Civil Code.

Additionally, a large portion of the tract it occupies consists of an old, abandoned Louisiana road (Hammond Highway), which ran parallel to Lake Pontchartrain. Although the highway is abandoned, the land still belongs to the State of Louisiana and is insusceptible to private ownership by a company such as Louisiana Materials Company.

It is felt that Louisiana Materials was afforded procedural due process. It was afforded a hearing when it was granted the privilege of an extension for one additional year without a lease. It was forewarned sixty days in advance that the extended period for its operation would terminate on February 28, 1970. Representatives of Louisiana Materials attended numerous hearings airing the complaints of residents both before the Jefferson Parish Council and the monthly meetings of the Pontchartrain Levee District. It did not take advantage of public hearings held weekly by the Jefferson Parish Council in which every citizen is allowed the right to address its local government on any matter of concern.

The private interest of Louisiana Materials is not substantially affected by the closing of this Plant for it has two or three other locations where its customers may obtain shells, sand and gravel.

The closing of this Plant had removed the violation of the Jefferson Parish Zoning Ordinance and, the continuous violation of the street load limit law. It has removed the danger of a barge ramming the pumping station and has avoided the traffic, noise and dust which results from an operation of this nature. It has returned the location to a placid residential development, all of which was a serious concern to the governing authority of the Parish of Jefferson.

It is respectfully submitted that the notice and hearings afforded Louisiana Materials Company meet the standards of procedural due process required in *Goldberg v. Kelly*, 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011; *Escalera v. New York City Housing Authority*, 425 F.2d 853 (1970); and *Zabel v. Tabb*, 430 F.2d 199 (1970).

Respectfully submitted,

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ATTORNEYS FOR
RESPONDENTS

CERTIFICATE OF SERVICE

I, James O. Manning, a member of the bar of the United States Supreme Court, certify that at least one copy of the foregoing Responsive Brief has been served on the adverse party by depositing same in a United States Mail Box, with first class postage prepaid, addressed to counsel's last known address in New Orleans, Louisiana:

Mr. Neal D. Hobson
Milling, Saal, Benson, Woodward & Hillyer
Attorneys at Law
1122 Whitney Building
New Orleans, Louisiana

Gretna, Louisiana, this ____ day of January, 1972.

_____
James O. Manning
Assistant Parish Attorney